

SIN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS ANTONIO AGUIRRE JR.,
Petitioner.

No. 2 CA-CR 2020-0077-PR
Filed July 30, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County

No. CR20143156001

The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Luis Antonio Aguirre Jr., Kingman
In Propria Persona

STATE v. AGUIRRE
Decision of the Court

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

ECKERSTROM, Judge:

¶1 Petitioner Luis Aguirre Jr. seeks review of the trial court's order denying his request to modify his sentencing minute entry, which we treat as a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Aguirre has not met his burden of establishing such abuse here.

¶2 After a jury trial in 2015, Aguirre was convicted of molestation of a child. The trial court sentenced him to a ten-year prison term. This court affirmed his conviction and sentence on appeal. *State v. Aguirre*, No. 2 CA-CR 2015-0404 (Ariz. App. May 23, 2016) (mem. decision).

¶3 Thereafter, Aguirre initiated a proceeding for post-conviction relief. Appointed counsel filed a notice stating she had reviewed the record but had found no colorable claims to raise in a Rule 32 petition. The trial court granted Aguirre an extension of time in which to file a pro se petition, but he failed to do so, and the court dismissed the proceeding in January 2017.

¶4 More than three years later, in February 2020, Aguirre filed a "Motion for Clarification of Sentencing Order," arguing he had recently learned from the Arizona Department of Corrections (ADOC) that he had to serve a term of community supervision upon completion of his prison term but the trial court had entered no such order at sentencing. He therefore requested "an order that [he] is not required to serve a term of community supervision." In response, the court provided Aguirre a copy of the October 2015 sentencing minute entry, explaining that it had ordered him to serve a term of community supervision pursuant to A.R.S. § 13-603(I).

¶5 Aguirre filed a "Response to Court's Order," asserting that because the trial court "did not impose[,] in open court, a term of community supervision," it could not do so in its sentencing minute entry.

STATE v. AGUIRRE
Decision of the Court

He requested that the court strike that order. The following month, the court denied the request, explaining that Aguirre had failed to cite “any authority articulating under what theory he can procedurally bring this motion at this time” or “any authority that allows [it] to vacate any portion of a sentence that was imposed years prior on October 20, 2015.” This petition for review followed.¹

¶6 Ordinarily, a Rule 32 proceeding is commenced by timely filing a notice of post-conviction relief. Ariz. R. Crim. P. 32.4; *see also* Ariz. R. Crim. P. 32.1 (listing grounds for relief in post-conviction proceedings). Under Rule 32.2, a successive or untimely notice of post-conviction relief is subject to summary dismissal under certain circumstances. Rule 32.11(a) similarly provides that a court must summarily dismiss a petition for post-conviction relief if, “after identifying all precluded and untimely claims,” it determines that “no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule.”

¶7 To the extent that Aguirre’s request to strike the community supervision order from the sentencing minute entry could be construed as falling under Rule 32.1(a)—that his sentence was imposed in violation of the United States or Arizona constitutions—his claim is precluded as “waived at trial or on appeal, or in any previous post-conviction proceeding.” Ariz. R. Crim. P. 32.2(a)(3). And to the extent his request could be characterized as falling under Rule 32.1(c)—that his sentence as imposed is not authorized by law—Aguirre failed to “explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.”² Ariz. R. Crim. P. 32.2(b). Thus, the trial court did not abuse its discretion in summarily dismissing it. *See Martinez*, 226 Ariz. 464, ¶ 6.

¹Although Aguirre filed a notice of appeal from the trial court’s March 2020 order, this court treated his notice as a petition for review. *See* Ariz. R. Crim. P. 32.3(b) (court must treat any request for relief challenging sentence following trial as petition for post-conviction relief); *see also* Ariz. R. Crim. P. 24.3(a) (setting timelines under which trial court may correct unlawful sentence).

²Although Aguirre claims he “recently” learned of the community supervision requirement from ADOC, it has been part of the record in this case since entry of the October 2015 sentencing minute entry. *See* Ariz. R. Crim. P. 32.2(b) (requiring “sufficient reasons” why claim not raised in previous notice or petition, or in timely manner).

STATE v. AGUIRRE
Decision of the Court

¶8 Even assuming the claim were not precluded, Aguirre has not established that the trial court abused its discretion. Aguirre argues that the court's denial of his request to strike the community supervision order "is at odds" with a ruling from another division of the Pima County Superior Court, which granted a motion for clarification in a different case, ordering that the defendant was not required to serve community supervision. But that ruling is not binding precedent. *See Sell v. Gama*, 231 Ariz. 323, ¶ 31 (2013) (lower courts required to follow decisions of higher courts). In addition, it does not support Aguirre's position. There, the court apparently failed to impose community supervision at the defendant's resentencing hearing, and, after the issue was raised four years later, the court determined it lacked jurisdiction to change the order at that time.

¶9 Accordingly, we grant review but deny relief.